DOCKET NO. NNH-CV14-6049044-S	:	SUPERIOR COURT
NUCAP INDUSTRIES INC., ET AL.	:	J.D. NEW HAVEN
VS.	:	AT NEW HAVEN
PREFERRED TOOL AND DIE, INC., ET AL.	:	OCTOBER 15, 2014

NOTICE OF DECISION IN *BOSCO V. EYELET TECH NUCAP CORP AND NUCAP INDUSTRIES, INC.*, DOC. NO. UWY-CV-14-6023433-S

The plaintiffs, Nucap Industries Inc. ("Nucap Industries") and Nucap US Inc., as the successor to Anstro Manufacturing ("Nucap US") (collectively "Plaintiffs" or "NUCAP"), respectfully request that the Court take notice of the Memorandum of Decision dismissing the action captioned, *Bosco v. Eyelet Tech NUCAP Corp. and NUCAP Industries, Inc.*, No. UWY-CV14-6023433-S, dated October 10, 2014, (Roraback, J.) and attached hereto as Exhibit A. The plaintiffs submit this Notice of Decision to the Court in further support of their Opposition to Defendants' Motions to Dismiss. (Doc. Nos. 108, 109).

PLAINTIFFS,
NUCAP INDUSTRIES, INC.
and NUCAP US, INC.

By */s/Nicole H. Najam*

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CERTIFICATION

This is to certify that a copy of the foregoing was mailed, postage prepaid or delivered electronically or non-electronically, on this 15th day of October, 2014 to all counsel and self-represented parties of record, as follows:

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Exhibit A

NO. UWY-CV-14-6023433-S

SUPERIOR COURT

ROBERT BOSCO, JR.

J.D. OF WATERBURY

VS.

AT WATERBURY

EYELET TECH NUCAP CORP., ET AL.

OCTOBER 10, 2014

MEMORANDUM OF DECISION RE: MOTION TO DISMISS (#104)

FACTS

On April 11, 2014, the plaintiff, Robert Bosco, Jr., commenced this action by service of process on the defendants, Eyelet Tech NUCAP Corporation (ETNC) and NUCAP Industries, Inc. (NUCAP). In his four count complaint, the plaintiff alleges the following facts. The plaintiff is an individual residing in Wolcott, Connecticut. NUCAP is an Ontario corporation with a principal place of business in Toronto, Ontario, Canada. ETNC, a wholly owned subsidiary of NUCAP, is a corporation organized under the laws of the state of Delaware, with a principal place of business in Connecticut and is registered as a foreign corporation conducting business in Connecticut.

The plaintiff was a co-manager and 50 percent owner of Eyelet Tech, LLC (Eyelet Tech), a Connecticut limited liability company. On November 19, 2009, the plaintiff and his co-owner sold Eyelet Tech to NUCAP and ETNC, pursuant to an Asset Purchase Agreement, wherein ETNC purchased certain assets and assumed certain liabilities of Eyelet Tech. As part of the sale transaction, the plaintiff entered into a Confidentiality, Non-Competition and Non-Solicitation Agreement (Non-Competition Agreement) with ETNC and NUCAP, which was also executed and

made effective on November 19, 2009. The restrictions under the Non-Competition Agreement were effective for five years and would expire on November 19, 2014, or would become void in the event of a default by the defendants of their obligation under the Asset Purchase Agreement or the Non-Competition Agreement between the parties. As consideration for these restrictions in the Non-Competition Agreement, ETNC agreed that it would pay the plaintiff the gross amount of $1,000,000 in five equal annual installments (Covenant Payments).

The plaintiff, as part of the sale transaction in November of 2009, entered into an employment agreement with Anstro Manufacturing, Inc. (Anstro), another wholly owned subsidiary of NUCAP. On January 23, 2012, the plaintiff's employment with Anstro ceased. The plaintiff entered into negotiations with NUCAP, and, on May 31, 2012, entered into a Confidential Separation Agreement and General Release (Separation Agreement), which set forth the terms of the plaintiff's separation from Anstro. Under section 7 (b) of the Separation Agreement, NUCAP and the plaintiff ratified the parties' obligations to each other under the Non-Competition Agreement. Additionally, section 15 of the Separation Agreement provided that, in the event of breach of any party's obligations under that agreement or any of the agreements referenced in the Separation Agreement, the non-breaching party had the right to recover attorney's fees and costs. Section 17 of the Separation Agreement set forth the choice of law for that agreement, which stated that Connecticut law would govern the enforcement of the Separation Agreement. Section 18 of the Separation Agreement provided that all actions or proceedings arising out of or related to the Separation Agreement would be litigated exclusively in Connecticut courts.

On November 11, 2013, the plaintiff received a letter from NUCAP, inquiring about certain actions of the plaintiff that may have been in violation of the Non-Competition Agreement. The plaintiff denied these allegations. Subsequently, on November 18, 2013, the plaintiff received notice from NUCAP that it had deemed him to be in violation of the Non-Competition Agreement. The defendants, based on these alleged violations, refused and continue to refuse to make Covenant Payments to the plaintiff. The plaintiff further alleges that he has fulfilled and continues to comply with his obligations to the defendants under the Non-Competition Agreement.

In counts one through four of the complaint, the plaintiff alleges breach of contract, breach of the guaranty against NUCAP, breach of the covenant of good faith and fair dealing against NUCAP and ETNC, and violations of General Statutes § 42-110b et seq., the Connecticut Unfair Trade Practices Act (CUTPA), against NUCAP and ETNC, respectively.

On June 16, 2014, the defendants filed a motion to dismiss the plaintiff's complaint, accompanied by a memorandum of law in support. On August 6, 2014, the plaintiff filed an objection to the motion to dismiss, accompanied by affidavits and exhibits.. Thereafter, on August 7, 2014, the defendants objected to the plaintiff's untimely objection. The plaintiff responded on August 8, 2014, with a memorandum. The court heard oral argument on the matter on August 11, 2014.

DISCUSSION

"[A] motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court." (Internal quotation marks omitted.) *Santorso* v. *Bristol Hospital*, 308 Conn. 338, 350, 63 A.3d 940 (2013). "A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction." (Internal quotation marks omitted.) *Dayner* v.

Archdiocese of Hartford, 301 Conn. 759, 774, 23 A.3d 1192 (2011). "The grounds which may be asserted in [a motion to dismiss] are: (1) lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the person; (3) improper venue; (4) insufficiency of process; and (5) insufficiency of service of process." *Zizka* v. *Water Pollution Control Authority*, 195 Conn. 682, 687, 490 A.2d 509 (1985), citing Practice Book § 143, which is now § 10-30 (a).

The defendants argue that the court should dismiss the plaintiff's complaint for improper venue. Specifically, the defendants argue that because the allegations in the complaint relate only to alleged violations of the Non-Competition Agreement, and pursuant to the forum selection clause contained in the Non-Competition Agreement, New York, rather than Connecticut, is the proper venue. Therefore, the defendants conclude, this court does not have jurisdiction. In objection, the plaintiff argues that Connecticut is the proper venue because the Separation Agreement between the parties, which ratified and incorporated the Non-Competition Agreement, contained a forum selection clause indicating jurisdiction in Connecticut.[1]

"While improper venue may be raised by a motion to dismiss . . . the claim does not go to subject matter jurisdiction, but rather it is a claim that the court, which otherwise has personal jurisdiction over the defendant, should decline to exercise it under the circumstances." (Internal quotation marks omitted.) *General Electric Capital Corp.* v. *Metz Family Enterprises, LLC,*

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[1] The defendants argue that the court should not consider the plaintiff's objection to the present motion because the objection was not filed within thirty days, pursuant to Practice Book § 10-31. Section 10-31 (a) provides in relevant part: "Any adverse party shall have thirty days from the filing of the motion to dismiss to respond to the motion to dismiss . . . ." "Despite the language of Practice Book § 10-31 [a], most courts have exercised discretion to address the merits of a motion to dismiss and to waive the . . . requirement when an opposing memorandum was untimely." (Internal quotation marks omitted.) *Prenderville* v. *Sinclair*, Superior Court, judicial district of Middlesex, Docket No. CV-13-6010439-S (May 16, 2014, *Marcus, J.*).

In the present case, the defendants filed their motion to dismiss on June 16, 2014. The plaintiff's objection was filed on August 6, 2014, which is more than thirty days after the filing of the motion to dismiss. This court, using its discretion, will consider the untimely objection and address the merits of the motion to dismiss.

Superior Court, judicial district of Litchfield, Docket No. CV-11-6004605-S (September 8, 2011, *Pickard, J.*) (52 Conn. L. Rptr. 386, 390). "A forum selection clause is a contractual provision agreed to by private parties that constitutes the parties' agreement as to the place of the action where the parties will bring any litigation related to the contract. Restatement (Second) of Conflict of Laws § 80 (1971)." (Internal quotation marks omitted.) *Western Dermatology Consultants, P.C.* v. *VitalWorks, Inc.*, 146 Conn. App. 169, 202, 78 A.3d 167, cert. granted, 310 Conn. 955, 81 A.3d 1182 (2013).

"Historically, courts viewed forum selection clauses as improper attempts by the parties to oust jurisdiction from a court that otherwise had the authority to hear an action." *Reiner, Reiner & Bendett, P.C.* v. *Cadle Co.*, 278 Conn. 92, 100-101, 897 A.2d 58 (2006). "In more recent years, however, courts have concluded that forum selection clauses do not oust courts of their jurisdiction, but they have been willing to enforce such contract clauses as long as they were reasonable by declining to exercise jurisdiction over an action in certain circumstances." Id., 101. The Connecticut Supreme Court has recognized the enforceability of forum selection clauses and has approved of the proposition that forum selection clauses may be used as a means of arguing that a court should not exercise jurisdiction when the clause provides for jurisdiction in another forum. Id., 103; see also, *United States Trust Co.* v. *Bohart*, 197 Conn. 34, 42, 495 A.2d 1034 (1985). "Connecticut case law is clear that the courts will uphold an agreement of the parties to submit to the jurisdiction of a particular tribunal." (Internal quotation marks omitted.) *Friedman* v. *Jamison Business Systems, Inc.*, Superior Court, judicial district of Danbury, Docket No. CV-01-0343518-S (February 25, 2002, *White, J.*) (31 Conn. L. Rptr. 473, 473). In Connecticut, the general rule is that "parties to a contract may agree in advance to submit to the jurisdiction of a given court. . . . Absent a showing of fraud or overreaching, such forum clauses will be enforced

by the courts." (Internal quotation marks omitted.) *Phoenix Leasing, Inc.* v. *Kosinski*, 47 Conn. App. 650, 654, 707 A.2d 314 (1998). Thus, "[e]ven when minimum contacts with the forum state are lacking, personal jurisdiction can be conferred on a court by consent of the parties. . . . One such manner of consent is by way of a forum selection clause." (Citation omitted; internal quotation marks omitted.) *Lincoln Imports Ltd., Inc.* v. *Vinny's Garden Center, Inc.*, Superior Court, judicial district of New Haven, Docket No. CV-12-6031851-S (April 24, 2013, *Mullins, J.*).

"Judges of the Superior Court have adopted a two-part analysis to determine whether a forum selection clause should be enforced. First, the court must look to contract formation itself to ascertain whether the clause was the product of fraud or deception or whether the bargaining power of the parties was so out of balance that the clause should not be enforced. . . . This step allows, inter alia, consideration [of] whether the provision is contained in an adhesion or take or leave it contract which the party was compelled to accept without argument, or discussion. . . . Second, the court considers whether, even if there existed no fraud, deception, or significantly uneven bargaining power, enforcement of the clause would cause such inconvenience to the party bringing suit that the otherwise valid contractual provision should not be enforced." (Citation omitted; internal quotation marks omitted.) *BKJRT, Inc.* v. *Sovereign Bank,* Superior Court, judicial district of New London, Docket No. CV-10-6005148-S (January 26, 2011, *Martin, J.*).

In the present case, applying the first part of the two-part analysis referenced above, the parties do not dispute that both the Non-Competition Agreement and the Separation Agreement were negotiated at arm's length by sophisticated parties. Additionally, the parties do not dispute the content of the particular forum selection clauses contained in each agreement. Rather, the parties disagree as to which forum selection clause controls this particular dispute.

The Non-Competition Agreement provides in section 6: "Choice of Law and Forum. This

Agreement shall be construed in accordance with and governed by Connecticut law without reference to the conflicts or choice of law principles thereof. Any litigation arising out of or relating to this Agreement shall be filed and pursued exclusively in the State or Federal courts in the County of New York, New York, and the parties hereto consent to the jurisdiction of and venue in such courts."

Section 18 of the Separation Agreement provides: "Consent to Jurisdiction. Each of the parties irrevocably and unconditionally submits to the exclusive jurisdiction of the United States District Court for the District of Connecticut or the Connecticut Superior Court, and irrevocably agrees that all actions or proceedings arising out of or relating to this Agreement will be litigated exclusively in such courts. Each of the parties agrees not to commence any legal proceeding related to this Agreement except in such courts. Each of the parties irrevocably waives any objection which he or it may now or hereafter have to the venue of any such proceeding in any such court and further irrevocably and unconditionally waives and agrees not to plead or claim in any such court that any such action, suit or proceeding brought in any such court has been brought in an inconvenient forum."

In his complaint, the plaintiff pursues various causes of action for alleged violations of the Non-Competition Agreement. There is no allegation that the defendants violated specific provisions of the Separation Agreement. In support of his position that section 18 of the Separation Agreement controls the forum selection of this lawsuit, however, the plaintiff directs the court to section 7 (b) of the Separation Agreement, which provides, in relevant part: "[The plaintiff] hereby ratifies and confirms that he is obligated to comply with certain continuing obligations contained in [the Non-Competition Agreement] by and among [the plaintiff and the defendants] dated as of November 19, 2009, which is incorporated herein by reference." This

language, the plaintiff suggests, allows the court to infer that the parties intended the Separation Agreement to supersede provisions of the Non-Competition Agreement. This court, however, will not make that inference as the plain and unambiguous language of section 7 (b) indicates only that the plaintiff is still obligated to comply with the provisions of the Non-Competition Agreement. There is no indication that the parties intended that by "incorporating by reference" the Non-Competition Agreement into the Separation Agreement, that all of the provisions contained within the Non-Competition Agreement were superseded by the Separation Agreement. The heading under which section 7 (b) is located also indicates that the inclusion of this language was merely to confirm and ratify the continued obligations found in other agreements between the parties. Under Connecticut law, incorporation by reference must be clear and unequivocal; *Halling* v. *Jetseal, Inc.*, Superior Court, judicial district of New Haven, Docket No. CV-01-0446481-S (June 5, 2001, *Devlin, J.*) (29 Conn. L. Rptr. 699, 700), citing *Randolph Construction Co.* v. *Kings East Corp.*, 165 Conn. 269, 275, 334 A.2d 464 (1973); and, here, it is not clear and unequivocal that any provision of the Non-Competition Agreement is superseded or altered by its incorporation into the Separation Agreement.

In paragraph 7 of the facts the plaintiff asserts the court must accept in his objection to the motion to dismiss, the plaintiff states that "[t]he parties agreed in the Separation Agreement that Connecticut law would govern the enforcement of all the Agreements – the Non-Competition Agreement, the [Asset Purchase Agreement] and the Separation Agreement (Section 17) – and that all actions thereunder would be brought in either the U.S. District Court for the District of Connecticut or the Connecticut Superior Court (Section 18)." This argument is misleading. Sections 17 and 18 of the Separation Agreement do not state "all Agreements" would be governed by Connecticut law and brought in Connecticut courts. Rather, sections 17 and 18 provide that

"this Agreement" would be governed and interpreted by Connecticut law, and any actions or proceeding arising out of or relating to "this Agreement" would be litigated in Connecticut courts, referring to the Separation Agreement. "[W]here there is definitive contract language, the determination of what the parties intended by their contractual commitments is a question of law. . . . [Connecticut courts] accord the language employed in the contract a rational construction based on its common, natural and ordinary meaning and usage as applied to the subject matter of the contract. . . . Where the language is unambiguous, we must give the contract effect according to its terms." (Citations omitted; internal quotation marks omitted.) *Landmark Investment Group, LLC* v. *Chung Family Realty Partnership, LLC*, 125 Conn. App. 678, 690, 10 A.3d 61 (2010). Therefore, this court concludes that the use of the language "this Agreement" in sections 17 and 18 of the Separation Agreement is unambiguous and only refers to the Separation Agreement.

Applying the second part of the two-part analysis referenced above, this court concludes that enforcement of the forum selection clause in the Non-Competition Agreement would not cause such inconvenience to the party bringing suit that the otherwise valid contractual provision should not be enforced. The plaintiff lives in Connecticut. Although Connecticut courts would likely be more convenient for the plaintiff, jurisdiction in New York would not be sufficiently inconvenient to override the contractual provisions to which the parties agreed.

Because the plaintiff's cause of action is brought pursuant to alleged violations of the Non-Competition Agreement, and not for violations of the Separation Agreement, the Non-Competition Agreement controls the present litigation. Additionally, the Separation Agreement does not indicate that it supersedes all previous agreements of the parties. It only indicates that the obligations under other agreements, including the Non-Competition Agreement,

are ratified and confirmed, and therefore continue. This court concludes that the present matter was brought in an improper venue, pursuant to the forum selection clause of the Non-Competition Agreement.

CONCLUSION

For the foregoing reasons, the court grants the defendants' motion to dismiss for improper venue.

RORABACK, J.

RORABACK, J.